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## The Tender Trap: State Takeover Statutes and Their Constitutionality

Diane S. Wilner

Craig A. Landy

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## The Tender Trap: State Takeover Statutes and Their Constitutionality

### Cover Page Footnote

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# THE TENDER TRAP: STATE TAKEOVER STATUTES AND THEIR CONSTITUTIONALITY

DIANE S. WILNER\* AND CRAIG A. LANDY\*\*

## I. INTRODUCTION

IN THE last decade, tender offers<sup>1</sup> have become a common method for acquiring control of publicly held corporations, because they are less expensive and less time-consuming than traditional acquisition devices such as negotiated mergers, gradual market acquisition, or the proxy system of gaining control.<sup>2</sup> Tender offers have been viewed by some as "reckless corporate raids on 'proud old companies' "<sup>3</sup> and by others as a method of promoting society's best interests "by providing [a] method of removing entrenched but inefficient management."<sup>4</sup>

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1. A tender offer may be defined as a public invitation extended to all (or a class) of the shareholders of a company (the "target") to sell their shares to an offeror, during a fixed period of time, at a specified price. See Fleischer & Mundheim, *Corporate Acquisitions By Tender Offer*, 115 U. Pa. L. Rev. 317 (1967). The offer requests a transfer of securities in return for cash or other securities generally valued at a higher market price than the sought-after shares. Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250, 1251 (1973).

2. Takeovers Applying "Unfriendly" Persuasion, *Time*, Dec. 15, 1975, at 58. Over 100 offers were registered with the Securities and Exchange Commission during each of the past three fiscal years. Rattner, *States Acting to Put Curb on Takeovers*, N.Y. Times, July 6, 1976, at 41, col. 8. In 1960, only eight cash tender offers involved corporations with securities listed on national securities exchanges, whereas the number rose to 107 in 1966. E. Aranow & H. Einhorn, *Tender Offers For Corporate Control* 65 n.3 (1973) [hereinafter cited as *Corporate Control*]. Depressed market conditions may have accounted for the increase in takeover attempts, since an offeror can pay a premium above the market price for shares of a profitable company and still get a good return on its money. But the proliferation of offers may well continue despite overall market improvement. See Robinson, *Tender Offers: Some Facts and Fancies*, 175 N.Y.L.J., May 17, 1976, at 1, col. 2; 4, col. 1. Even when market prices rise they may remain well below asset value. See *Ruthlessness By The Rules*, *Forbes*, Feb. 1, 1976, at 28, col. 2. Explanations for the increase in the number of cash tender offers during the 1960's center around such economic elements as the increase in corporate liquidity, availability of credit, and low market prices for securities, all of which make transfers attractive. Furthermore, corporate leaders were acquiring increased sophistication regarding tender offer techniques and recognized the utility of tender offers in promoting the smooth transfer of corporate power while avoiding the expense, discord and accusations which often accompany proxy contests. Moreover, the scope of federal and state regulation of tender offers was limited. *Corporate Control*, supra, at 65-66.

3. Aranow & Einhorn, *State Securities Regulation of Tender Offers*, 46 N.Y.U.L. Rev. 767 (1971).

4. *Id.* at 767-68.

Apart from such partisan views, voiced by incumbent executives on one hand and corporate bargain-hunters on the other, tender offers, like other securities transactions, are prone to abuse and hence soon became the subject of extensive Congressional scrutiny. Federal regulation of cash<sup>5</sup> tender offers began with the Williams Act,<sup>6</sup> which Congress adopted in 1968 as an amendment to the Securities Exchange Act of 1934.<sup>7</sup> The Williams Act was designed primarily to protect investors by providing for full disclosure of the material terms of offers and other material information concerning the companies involved, without favoring either the offeror or the management of the target company.<sup>8</sup>

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5. Until the Williams Act, see note 7 *infra*, became law, a cash tender offer for all the voting shares of a corporation, or enough to constitute control, was no different in law from an offer to purchase a single share under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-hh (1970). Exchange offers, however, in which the consideration to be paid for the target's shares is either debt or equity shares of another corporation, have long been subject to federal regulation. This is so since they constitute an offer to sell, making the offeror an underwriter within section 2 of the 1933 Act, or, if newly issued securities are used, registration may be required by section 5 of that Act. 15 U.S.C. §§ 77b, e (1970). Exchange offers are similarly affected by state blue sky laws, under which advance registration is frequently required. See 1 L. Loss, *Securities Regulation* 49 ff. (2d ed. 1961) [hereinafter cited as Loss]. See also note 20 *infra*.

6. Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1970)).

7. The first comprehensive legislative plan to control tender offers was introduced in Congress in 1965 by Senator Harrison Williams of New Jersey. S. 2731, 89th Cong., 1st Sess. (1965). In 1968, Congress passed and President Johnson signed into law provisions popularly known as the Williams Act, instituting federal regulation of tender offers for securities within federal regulation. The Williams Act provides for disclosure of certain information by an offeror where it appears that the purpose of the tender offer is a corporate takeover.

The Williams Act specifically addresses itself to the earlier ills that plagued shareholders of target corporations. Section 3(d)(5) permits shareholders, depositing securities pursuant to a tender offer, to withdraw their securities until seven days after the offer is first published or after sixty days if the securities have neither been purchased nor returned. 15 U.S.C. § 78n(d)(5) (1970). Also, if more shares than have been called for are tendered, in a tender calling for less than all outstanding securities, the offeror must prorate the sale among all shares tendered during the first ten days of the offer. 15 U.S.C. § 78n(d)(6) (1970). The latter section, governing proration, has been held to require that an offer calling for less than all outstanding shares must be held open at least ten days. *MGM, Inc. v. Transamerica Corp.*, 303 F. Supp. 1354, 1359 (S.D.N.Y. 1969). The offeror may find that the offer is not being accepted due to the rise in the market price for the target's securities, and will consequently raise the offering price. The Act requires that such increase be retroactive to all tendering shareholders, regardless of when the tender offer was made. 15 U.S.C. § 78n(d)(7) (1970). Finally, in construing 15 U.S.C. § 78n(e) (1970), the courts have extended to persons defrauded in tender offers the same remedies they have made available under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970), and rule 10b-5 pursuant thereto, 17 C.F.R. § 240.10b-5 (1976). See, e.g., *Dyer v. Eastern Trust & Banking Co.*, 336 F. Supp. 890, 914 (D. Me. 1971); cf., e.g., *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975).

8. See H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968); S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967).

The disclosure provisions of the Williams Act require the offeror to file information, listed in schedule 13D,<sup>9</sup> with the SEC identifying its background, the source and amount of consideration being offered, its purpose in the transaction, and other interests presently held in the target company. The Act, as amended,<sup>10</sup> applies when a tender offer could result in the direct or indirect ownership of more than five percent of any class of equity securities (1) registered under section 12 of the Securities Exchange Act,<sup>11</sup> or (2) issued by an insurance company which would have been required to register except for the exemption contained in section 12(g)(2)(G) of that Act,<sup>12</sup> or (3) issued by a closed-end investment company registered under the Investment Advisers Act of 1940.<sup>13</sup> If, together with all acquisitions made during the preceding twelve months, the tender offer can result in the ownership of no more than two percent of a class of securities, the offer is exempt from the disclosure requirements.<sup>14</sup> A company's attempt to repurchase its own securities is also exempt, as are those tender offers granted exemption pursuant to SEC rules, where no threat of an attempted takeover is present.<sup>15</sup>

State regulation of securities transactions occurring within the borders of the state predates federal regulation. State "blue sky" laws require full disclosure by issuers and regulate the activities of persons through whom securities are purchased or sold.<sup>16</sup> Recently, however, many states have also enacted "takeover statutes" which inject a new element into both the regulation and the strategy of tender offers. This Article examines existing state takeover statutes, their impact upon tender offers, and their constitutionality.

## II. STATE TAKEOVER STATUTES

At this writing, 23 states have enacted tender offer legislation.<sup>17</sup> In

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9. 17 C.F.R. § 240.13d-101 (1976).

10. 15 U.S.C. §§ 78m(d), n(d) (1970).

11. 15 U.S.C. § 78l (1970).

12. *Id.* § 78l(g)(2)(G).

13. 15 U.S.C. §§ 80a-1 to -52 (1970).

14. *Id.* § 78n(d)(8)(A).

15. *Id.* §§ 78n(d)(8)(B), (C).

16. See Loss, *supra* note 5, at 30-68; Aranow & Einhorn, *State Securities Regulation of Tender Offers*, 46 N.Y.U.L. Rev. 767, 768 (1971); notes 112-17 *infra* and accompanying text.

17. Alaska: Alaska Stat. §§ 45.57.010-.120 (1 CCH Blue Sky L. Rep. ¶¶ 6029-6029K (June 8, 1976)).

Colorado: Colo. Rev. Stat. Ann. §§ 11-51.5-101 to -108 (1 CCH Blue Sky L. Rep. ¶¶ 9151-57 (July 1, 1975)).

Connecticut: Pub. Act No. 76-362 (1 CCH Blue Sky L. Rep. ¶¶ 10,151-164 (June 2, 1976)).

Delaware: Del. Code Ann. tit. 8, § 203 (1 CCH Blue Sky L. Rep. ¶ 11,131 (May 1, 1976)).

Hawaii: Hawaii Rev. Stat. §§ 417E-1 to -15 (Supp. 1975) (effective May 24, 1974).

addition, one state is considering takeover legislation,<sup>18</sup> and a "model business takeover act" is being proposed this year by the Council of State Governments.<sup>19</sup> Finally, some states have interpreted their blue sky laws to apply to interstate tender offers.<sup>20</sup> Some of the takeover

Idaho: Idaho Code §§ 30-1501 to -1513 (Supp. 1975) (effective July 1, 1975).

Indiana: Ind. Code §§ 23-2-3-1 to -12 (Supp. 1976) (effective May 1, 1975).

Kansas: Kan. Stat. Ann. §§ 17-1276 to -1285 (1974) (effective July 1, 1974).

Kentucky: House Bill No. 349 (1A CCH Blue Sky L. Rep. ¶¶ 20,131-139 (July 1, 1976)).

Louisiana: La. Rev. Stat. §§ 51:1500-1512 (1A CCH Blue Sky L. Rep. ¶¶ 21,151-162 (June 28, 1976)).

Maryland: Md. Ann. Code §§ 11-901 to -908 (1A CCH Blue Sky L. Rep. ¶¶ 23,421-428 (July 1, 1976)).

Massachusetts: Mass. Gen. Laws ch. 110C, §§ 1-13 (1A CCH Blue Sky L. Rep. ¶¶ 24,261-273 (May 22, 1976)).

Michigan: Pub. Act No. 179 (1A CCH Blue Sky L. Rep. ¶¶ 25,341-357 (July 1, 1976)).

Minnesota: Minn. Stat. Ann. §§ 80B.01-13 (Cum. Supp. 1976) (effective May 18, 1973).

Nevada: Nev. Rev. Stat. §§ 78.376-3778 (1973) (effective 1969).

New York: N.Y. Bus. Corp. Law art. 16, added by Assembly Bill No. 11874-A, approved July 29, 1976 (effective Sept. 1, 1976).

Ohio: Ohio Rev. Code Ann. § 1707.041 (Page Supp. 1975) (effective Oct. 9, 1969).

Pennsylvania: Pub. L. No. 1106 (2 CCH Blue Sky L. Rep. ¶¶ 41,181-196 (March 3, 1976)).

South Dakota: S.D. Comp. Laws Ann. §§ 47-32-1 to -47 (Codified Laws Supp. 1976) (effective July 1, 1975).

Tennessee: Tenn. Code Ann. §§ 48-2101 to -2115 (3 CCH Blue Sky L. Rep. ¶¶ 45,191-205 (March 17, 1976)).

Utah: Senate Bill No. 10, §§ 1-15 (3 CCH Blue Sky L. Rep. ¶¶ 47,331-345 (Feb. 5, 1976)).

Virginia: Va. Code Ann. §§ 13.1-528 to -541 (1973) (effective March 5, 1968).

Wisconsin: Wis. Stat. Ann. §§ 552.01-25 (Spec. Pamphlet 1975) (effective July 1, 1972).

18. The New Jersey legislature considered such provisions during its 1975-1976 session, but did not enact them. Senate Bill No. 808 (1976 Sess.).

19. Wall St. J., June 24, 1976, at 1, col. 5. The model act is said to be patterned on the Indiana statute, Ind. Code §§ 23-2-3-1 to -12 (Supp. 1976).

20. The blue sky laws generally prohibit fraud in connection with a purchase as well as a sale of securities. See, e.g., Cal. Corp. Code § 25401 (West Supp. 1976). Several states' blue sky laws also appear to be subject to interpretations making their registration or disclosure requirements applicable to tender offers made by foreign corporations. The Mississippi securities division, for example, has a policy of "requir[ing] registration by qualification of all companies making tender offers to residents of Mississippi." Letter of Ben Hawkins, Deputy Secretary of State, March 10, 1976 (on file at Fordham Law Review). Similarly, New Mexico's law, e.g., requires registration as a broker-dealer by any nonresident who directs more than fifteen offers to state residents within twelve months. N.M. Stat. Ann. § 48-18-17B (1966). Montana's act is virtually identical. Mont. Rev. Codes Ann. § 15-2004(3) (1967). The Illinois Securities Division has proposed an interim rule to clarify its view that the state's securities laws apply to a cash offer for its own shares made by any issuer to resident shareholders. The rule is meant "to cover the period between [its date] and when appropriate legislation can be enacted[, i.e.] during the calendar year 1977." Letter of David Hart Wunder, Illinois Securities Commissioner, July 20, 1976 (on file at Fordham Law Review). This proposed rule 295 is entitled "Definition, for certain purposes, of the term 'employ any device, scheme or artifice to defraud in connection with the sale or purchase of any security as used in Section 121 [Ill. Rev. Stat. ch. 121 1/2, § 137.12 (Supp. 1973)].'" It



statutes have been in effect since 1969, but they had little impact until the past year.<sup>21</sup>

### A. *Provisions of the Statutes*

Although takeover statutes vary considerably, there are some characteristics common to all. A takeover offer is usually defined as an offer to acquire any equity security of a target company, if after the acquisition the offeror would be directly or indirectly the beneficial owner of a specified percentage<sup>22</sup> of any class of the outstanding equity securities of the target company.<sup>23</sup> The applicability of a takeover statute to a particular tender offer depends on such factors as whether the target company (1) is incorporated within the state in question, or (2) has its principal place of business there, and/or<sup>24</sup> (3) has substantial assets located within the state.<sup>25</sup>

Some tender offers that fit the above definition are exempt from the provisions of the statutes. Presently there are fourteen specific types of exemptions:<sup>26</sup>

(1) An offer to acquire any equity securities, if the acquisition, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months would not exceed

provides that an issuer whose securities are registered under the state securities act or the Securities Act of 1933 and are held of record by at least 100 state residents, who constitute at least 20% of all holders of record, may not make a tender offer for its own shares without twenty days' pre-effective notice, if the offer's effect would be to permit the issuer to delist its shares from a national exchange or from being quoted over-the-counter, or to terminate registration of the securities.

21. See notes 60-64 *infra* and accompanying text.

22. The percentages specified vary between 5% and 20% with most states using 10%.

23. See, e.g., Colo. Rev. Stat. Ann. § 11-51.5-102(13) (1 CCH Blue Sky L. Rep. ¶ 9152 (July 1, 1975)).

24. In some states the language of the statute is in the disjunctive and in others it is in the conjunctive. Although it might appear that where the conjunctive is used both elements must be present to trigger the statute this is not necessarily so. In *Copperweld Corp. v. Societe Imetal*, 75 Civ. 09-3868 (C.P. Franklin County, Ohio, Oct. 9, 1975), the Ohio statute, written in the conjunctive, was interpreted by the Attorney General of Ohio to equate "substantial assets" with "principal place of business." See notes 71-73 *infra* and accompanying text.

25. Section 2(a) of the Connecticut Act, Pub. Act No. 76-362 (1 CCH Blue Sky L. Rep. ¶¶ 10,151-64 (June 2, 1976)), provides other bases for applicability, i.e., when a target company has "its principal executive offices" or "a majority of its business operations"—an elusive concept—in the state.

26. No statute contains all of the exemptions and two statutes contain significant exemptions not found in the others. The Kansas takeover statute, Kan. Stat. Ann. § 17-1276 (1974), does not apply to any corporation registered under the Securities Exchange Act of 1934. The Delaware Act, Del. Code Ann. tit. 8, § 203(d) (1 CCH Blue Sky L. Rep. ¶ 11,131 (May 1, 1976)), states that any Delaware corporation may provide in its certificate of incorporation that takeover bids for its shares shall not be governed by the section.

two percent of that class (Colorado, Connecticut, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Pennsylvania, South Dakota, Utah, Wisconsin).<sup>27</sup>

(2) An offer made by an issuer to acquire (a) its own securities;<sup>28</sup> or, in some states, (b) securities of a subsidiary of which at least two-thirds (fifty-one percent in some states) of the voting securities are owned beneficially by such issuer (Alaska, Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, Wisconsin).

(3) An offer to acquire equity securities of a class not registered pursuant to section 12 of the Securities Exchange Act of 1934 (Colorado, Nevada, Utah, Virginia).

(4) An offer to acquire equity securities effected by a registered broker-dealer on a stock exchange or in the over-the-counter market, if the broker performs only the customary broker's function and neither the broker nor the principal solicits or arranges for the solicitation of orders to sell such equity securities (Michigan) and the broker receives no more than the customary broker's commission (Alaska, Colorado, Connecticut, Delaware, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, Pennsylvania, Tennessee, Virginia).

(5) An offer to acquire equity securities where the target company recommends that the shareholders accept the offer (Michigan,<sup>29</sup> Utah), and the terms of which have been furnished to shareholders (Alaska, Massachusetts), and which is made to all shareholders on equal terms (Idaho, Indiana, Kansas, Kentucky, Louisiana,<sup>30</sup> Maryland, Minnesota, New York, Ohio, South Dakota, Tennessee, Virginia, Wisconsin).

(6) An offer which the state commissioner of securities<sup>31</sup> shall

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27. Such provisions are consistent with the Williams Act. See 15 U.S.C. §§ 78m(d)(6)(B), n(d)(8)(A) (1970).

28. The Williams Act also exempts such transactions. *Id.* §§ 78m(d)(6)(C), n(d)(8)(B).

29. This exemption is significant in that the takeover statute, in effect, has no application to friendly tender offers, whereas in many cases, it provides the target company's management with a shield against unfriendly offers. One state, Michigan, appears to have done so at the expense of offeree shareholders. The statute is ambiguous: if an offer is not exempt and thus is required to be registered, the registration statement must disclose any negotiations or understandings with management concerning future employment, or with shareholders concerning purchase of their shares on terms different from those of the offer. However, any offer which is proposed to and approved by management is exempt, and hence no registration statement need be filed. Mich. Pub. Act No. 179, §§ 4(2)(d), 8(1)(f) (1A CCH Blue Sky L. Rep. ¶¶ 25,344, 25,348 (July 1, 1976)).

30. The exemption is available in Louisiana "unless the target company is a natural resource company." La. Rev. Stat. § 51:1500(11)(e) (1A CCH Blue Sky L. Rep. ¶ 21,151 (June 28, 1976)).

31. The commissioners administer the filing and hearing requirements of the state statutes

exempt by rule or order (Colorado, Connecticut, Indiana, Louisiana, Maryland, Michigan, Minnesota, New York, Pennsylvania, South Dakota, Utah, Virginia).<sup>32</sup>

(7) Isolated offers to purchase shares from individual stockholders, not made to stockholders generally (Alaska, Hawaii, Kansas, Nevada, Ohio, Virginia, Wisconsin) or not made to more than thirty (Delaware) or fifteen shareholders (Tennessee).

(8) An offer to exchange the securities of one issuer for the securities of another issuer, if the offeror is registered or exempt under the Securities Act of 1933 (Connecticut, Maryland, Minnesota, Tennessee, Wisconsin).

(9) An offer to purchase shares in accordance with a registration statement under the Securities Act of 1933 (Massachusetts, Nevada).<sup>33</sup>

(10) An offer to acquire shares of a corporation or of a class with less than 100 shareholders (Alaska, Connecticut, Indiana, Louisiana, Maryland, Michigan, Wisconsin) and (a) with less than one million dollars in assets (Hawaii, Pennsylvania) or (b) when the offer is made to all shareholders (Idaho).<sup>34</sup>

(11) Bids by a broker-dealer for his own account in the ordinary course of business of buying and selling such securities (Idaho, Indiana, Kansas, New York, Ohio, South Dakota, Wisconsin).

(12) Exchange offers not involving any public offering within the meaning of section 4 of the Securities Act of 1933 (Idaho, Kentucky, New York, Ohio, South Dakota, Wisconsin).

(13) An offer for the sole account of the offeror made during any period of twelve consecutive months to not more than ten persons in the state (15 in Michigan and Tennessee, 25 in Maryland, Massachusetts and Pennsylvania, 50 in New York) and not for the purpose of avoiding the statute (Idaho, South Dakota, Tennessee).

(14) An offer involving a class vote by stockholders of the target company to approve a merger, consolidation, or sale of assets in consideration of the issuance of securities of another corporation, or to approve the sale of its securities in exchange for cash or securities of another corporation (Connecticut, Idaho, Maryland, Minnesota,

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and adopt rules and forms necessary to carry out the provisions of the statutes. See, e.g., Minn. Stat. Ann. § 80B.07 (Cum. Supp. 1976).

32. This kind of provision parallels the federal Act, 15 U.S.C. § 78n(d)(8)(C) (1970), but is, of course, rife with potential for conflict.

33. The Williams Act includes this exemption. Where such registration is made, the offeror is voluntarily giving up the ability, afforded by the Williams Act, to avoid predisclosure. *Id.* § 78m(d)(6)(A).

34. This exemption lends support to the contention that takeover statutes are designed to protect only large domestic companies, while leaving small, closely held corporations unaffected.

Pennsylvania, South Dakota, Wisconsin), following a proxy solicitation (Utah).

An examination of the various exemptions shows that most of these statutes are aimed at regulating unfriendly tender offers<sup>35</sup> directed at larger companies.<sup>36</sup>

If the tender offer is regulated by a takeover statute, the offeror is required to file specified information with the designated state securities commission and to send copies to the target company, usually prior to making the takeover bid. The offeror is usually required to file ten days prior to its takeover bid,<sup>37</sup> but may be required to file as early as thirty days prior to the effective date of the offer.<sup>38</sup> As a result of these filing requirements, the effective date of the tender offer is delayed beyond the initial date of disclosure and, in effect, a waiting period not required by the Williams Act is imposed on the offeror.

The information required to be filed pursuant to takeover statutes<sup>39</sup> is, in some cases, similar to the disclosure requirements of schedule 13D<sup>40</sup> under the Williams Act.<sup>41</sup> However, several states go substantially beyond those requirements and provide that the offeror must file a statement which is equivalent to the combined information on a schedule 13D under the Williams Act and on a registration form S-1<sup>42</sup> under the Securities Act of 1933.<sup>43</sup>

In addition to the waiting period imposed by the filing requirements, takeover statutes often have other requirements that affect the time at which a tender offer can be made. Most statutes provide that the

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35. See exemptions (2) and (5).

36. See exemptions (3), (10) and (13).

37. Idaho Code § 30-1502 (Supp. 1975); Minn. Stat. Ann. § 80B.02 (Cum. Supp. 1976); Nev. Rev. Stat. § 78.3771 (1973); S.D. Comp. Laws Ann. § 47-32-21 (Supp. 1976); Wis. Stat. Ann. § 552.03 (Spec. Pamphlet 1975).

38. See Kan. Stat. Ann. § 17-1277 (1974).

39. See, e.g., Minn. Stat. Ann. § 80B.02 (Cum. Supp. 1976); Nev. Rev. Stat. § 78.3771 (1973).

40. 17 C.F.R. § 240.13d-101 (1976); see N.Y. Times, July 15, 1976, at 51, col. 6.

41. Corporate Control, *supra* note 2, at 60-61.

42. 17 C.F.R. § 239.11 (1976).

43. See, e.g., Ohio Rev. Code Ann. § 1707.041(B)(3) (Page Supp. 1975); Ind. Code § 23-2-3-2(c) (Supp. 1976). "Thus, in line with the S-1 requirements, the offeror is required to disclose complete information on its organization and operations, including, among other items, financial statements for the current period and for the three most recent annual accounting periods, a brief description of the location and general character of its principal physical properties, a description of all but routine litigation, a brief description of the general business development of the offeror and its subsidiaries during the past five years (as well as projected future developments), and biographical summaries of all directors and officers together with disclosure of any material interest of any director or officer in any material transaction during the preceding three years or in any proposed material transaction to which the offeror or any of its subsidiaries was or is to be a party." Corporate Control, *supra* note 2, at 159.

designated securities commission may hold a hearing on the adequacy of disclosures to be made and, in some instances, on the fairness of the terms of the tender offer. Upon request by the target company the hearing may become mandatory.<sup>44</sup> As a result of the hearing, registration of a tender offer will be delayed and may be denied by the state securities commission.

Takeover statutes also contain enforcement provisions and remedies. Many statutes empower the securities commission to issue cease and desist orders or to seek or issue injunctions.<sup>45</sup> A violation of these statutes may result in the imposition of a fine, imprisonment, or both.<sup>46</sup> Offerees are granted civil remedies<sup>47</sup> in the form of rescission or damages.

### B. *The Effect of State Takeover Statutes*

The most obvious effect of takeover statutes is the delay that probably will occur, particularly if a hearing procedure is invoked. Although a state securities commission may ultimately approve the tender offer, the target will have succeeded in eliminating the offeror's critical advantage of surprise and speed. For example, the Indiana takeover statute<sup>48</sup> provides that a hearing must be held within 20 days of the hearing order (the hearing order should be issued within 20 days of filing by the offeror) and a determination must be made within 60 days of the conclusion of the hearing. Thus, a target company could conceivably delay the tender offer by approximately one hundred days by simply requesting a hearing.<sup>49</sup> The target company may choose to

44. See, e.g., S.D. Comp. Laws Ann. § 47-32-23 (Supp. 1976); Minn. Stat. Ann. 80B.03 (Cum. Supp. 1976); Hawaii Rev. Stat. § 417E-3(g) (Supp. 1975); Ind. Code § 23-2-3-2(e) (Supp. 1976). These statutes authorize the state securities commissioner, as part of his examination of the registration statement of an offeror, to deny or condition the effectiveness of a takeover if he finds the offer unfair to the offerees. Consequently, a shareholder's opportunity to take advantage of the offered price may be blocked by the decision of an official of a state with whom the holder has little or no connection. But see Nev. Rev. Stat. § 78.376 et seq. (1973); Colo. Rev. Stat. Ann. § 11.51.5-108 (1 CCH Blue Sky L. Rep. ¶ 9158 (July 1, 1975)); and Conn. Pub. Act No. 76-362 (1 CCH Blue Sky L. Rep. ¶ 10,156 (June 2, 1976)), which do not provide for a hearing, and Ohio Rev. Code Ann. § 1707.041(B)(1)(b) (Page Supp. 1975), which gives the state agency discretion to refuse to hold a requested hearing.

45. See, e.g., Colo. Rev. Stat. § 11-51.5-108 (1 CCH Blue Sky L. Rep. ¶ 9158 (July 1, 1975)); Del. Code Ann. tit. 8, § 203(e) (1 CCH Blue Sky L. Rep. ¶ 11,131 (May 1, 1976)); Va. Code Ann. § 13.1-535 (1973); Wis. Stat. Ann. § 552.17 (Spec. Pamphlet 1975).

46. See, e.g., Del. Code Ann. tit. 8, § 203(e) (1 CCH Blue Sky L. Rep. ¶ 11,131 (May 1, 1976)); Mass. Gen. Laws ch. 110C, § 9(f) (1A CCH Blue Sky L. Rep. ¶ 24,269 (May 22, 1976)).

47. See, e.g., Kan. Stat. Ann. § 17-1283 (1974); Ind. Code § 23-2-3-10 (Supp. 1976); Md. Ann. Code § 11-906 (1A CCH Blue Sky L. Rep. ¶ 23,426 (July 1, 1976)).

48. Ind. Code §§ 23-2-3-2(e), (f) (1A CCH Blue Sky L. Rep. ¶ 17,152 (May 1, 1975)).

49. Id. The magnitude of this delay is not unusual. Cf., e.g., Mass. Gen. Laws ch. 110C, §§

do this in the hope that the tender offer will die a natural death,<sup>50</sup> or in order to gain time to defend itself against the tender offer.<sup>51</sup> A target's most effective defensive tactic is to stall for time, allowing market forces to make it economically undesirable for shareholders to relinquish their securities.<sup>52</sup>

A public announcement of a tender offer will stimulate open-market purchase of the target's securities by present shareholders or speculators expecting to realize a quick profit on their short term investment.<sup>53</sup> Active trading will raise the price of the target's securities, and, as the market price draws closer to the tender offer price, the economic incentive for shareholders to sell their stock will fade.<sup>54</sup> Furthermore, as the margin narrows between the market and tender offer prices, shareholders may be more receptive to management's appeals not to sell and to support the status quo through a combination of loyalty and lack of economic incentive.<sup>55</sup>

A second effect of these statutes, noted with disapproval in a New York Stock Exchange study, is that the potential for delay can increase the likelihood of irregular price fluctuations.<sup>56</sup> Price fluctuations in the market sometimes cause the SEC to halt trading in the target security

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6-7 (1A CCH Blue Sky L. Rep. ¶¶ 24,266-67 (May 22, 1976)) (150 days); Ohio Rev. Code Ann. § 1707.041(B)(4) (Page Supp. 1975) (100 days).

50. The Kentucky Act, House Bill No. 349 (1976), acknowledged this in its title: "An Act relating to the prevention of take-over bids . . . ."

51. Once a tender offer is underway, a target company may use a number of defensive measures to block the takeover. The target may buy its own stock and thereby raise the market price, declare an inflated dividend, merge with a friendly corporation, or solicit allied corporations to purchase its securities. The target may also attack the tender offer on antitrust grounds. See, e.g., *Muskegon Piston Ring Co. v. Gulf & Western Indus., Inc.*, 328 F.2d 830 (6th Cir. 1964); *Boyetown Burial Casket Co. v. Amedco, Inc.*, 407 F. Supp. 811 (E.D. Pa. 1976); *Corenco Corp. v. Schiavone & Sons, Inc.*, 362 F. Supp. 939 (S.D.N.Y.), modified, [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,108 (S.D.N.Y.), aff'd in part and rev'd in part, 488 F.2d 207 (2d Cir. 1973). The offer may also be challenged on the ground of nonconformity with other applicable regulatory statutes. See *Fleischer & Mundheim, Corporate Acquisition By Tender Offer*, 115 U. Pa. L. Rev. 317, 322 (1967). Indeed, potential antitrust problems may be arranged at the last moment by a potential target. See, e.g., *Ruthlessness By The Rules*, *Forbes*, Feb. 1, 1976, at 26, 27.

52. *Ruthlessness By The Rules*, *Forbes*, Feb. 1, 1976, at 24, 28, col. 3 (urges statutory delays); *Robinson, Tender Offers: Some Facts and Fancies*, 175 N.Y.L.J., May 18, 1976, at 1, col. 2, 4, col. 1.

53. *Corporate Control*, supra note 2, at 173-91. Indeed, arbitrageurs may have the decisive role in the success of tender offers. See *Ruthlessness By The Rules*, *Forbes*, Feb. 1, 1976, at 25.

54. *Wall St. J.*, Aug. 20, 1968, at 32, col. 1.

55. See Comment, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 So. Cal. L. Rev. 1133 (1974) [hereinafter cited as *Commerce Clause Limitations*].

56. A New York Stock Exchange review of the Ohio Act is summarized in *BNA Sec. Reg. & L. Rep. No. 1*, at A-12 (June 4, 1969).

between the time when the offer is filed and when it is published.<sup>57</sup> This can have adverse nationwide impact<sup>58</sup> and surely injects uncertainty into the situation. Conflicts among the substantive provisions of the present takeover statutes have already caused delays, price fluctuations and the possibility of suspension of trading. The enactment of takeover statutes by more states will impede the SEC's control and effective supervision of the market and increase the uncertainty of shareholders.<sup>59</sup> The uncertainty generated by the state statutes is demonstrated by an examination of the few recent cases that have applied these statutes.

Prior to the recent flurry of activity involving state takeover statutes, the authors' discussions with officials in many state securities divisions revealed that only one unfriendly tender offer made prior to the fall of 1975 had failed because of a state takeover statute.<sup>60</sup> In an Ohio filing in 1971, the offeror, prior to the expiration of the waiting period, had commenced the tender offer outside of Ohio for securities of an Ohio corporation. When the securities division did not order a hearing, the target sued in state court to obtain restraining orders, injunctions and a hearing.<sup>61</sup> The lower court ordered a hearing;<sup>62</sup> on appeal injunctive relief was granted and the statutory procedures were upheld.<sup>63</sup> The tender offer was ultimately withdrawn.<sup>64</sup>

Prior to 1975, when targets began to use takeover statutes effectively, the offeror had to be concerned primarily with maintaining secrecy prior to making its bid, and with the schedule 13D requirements.<sup>65</sup> Now the offeror must also be concerned with one or more state takeover statutes which may have serious adverse effects upon

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57. *Id.* at A-12.

58. Public confidence in the integrity of the securities markets may be undermined, if not lost, and stockholders would (temporarily) be denied a market for their securities.

59. Commerce Clause Limitations, *supra* note 55, at 1165.

60. In *In Re E-Z Paints Corp. and Newell Cos.*, 3 CCH Blue Sky L. Rep. ¶ 71,063 (Wisc. 1973), an offer was first filed in Wisconsin on December 5, 1972. After a review and five days of hearings by the Commissioner of Securities the offer became effective on January 30, 1973. The offer, though opposed by the target, was ultimately successful. A number of filings took place under state statutes in this period in Virginia and Minnesota but no hearings were held, apparently since the offers were "friendly."

61. *Sparton Corp. v. Ward*, Nos. 243, 230 (C.P., Franklin County, Ohio, Jan. 8, 1971). The facts in this unreported case are reviewed in *Corporate Control*, *supra* note 2, at 161-62.

62. *Id.*

63. *Sparton Corp. v. Ward*, No. 71-8 (Ct. App., Franklin County, Ohio, Jan. 12, 1971).

64. *Corporate Control*, *supra* note 2, at 162.

65. 17 C.F.R. § 240.13d-101 (1976). A false or misleading statement or omission concerning material facts in a schedule 13D could result in an injunction against the tender offer. See generally Note, *Tender Offer Regulation—Injunction Standards Under the Williams Act*, 45 *Fordham L. Rev.* 51 (1976).

the offer. This is exemplified by two recent cases in which state takeover statutes caused considerable delay: *Copperweld Corp. v. Imetal*<sup>66</sup> and *Otis Elevator Co. v. United Technologies Corp.*<sup>67</sup>

On September 9, 1975, Societe Imetal, a French concern, filed a schedule 13D with the SEC and made a tender offer for shares of the Copperweld Corporation, a Pittsburgh-based producer of specialty steels. In its verified complaint filed in the U.S. District Court for the Western District of Pennsylvania, alleging a variety of violations of Federal law,<sup>68</sup> Copperweld's president stated that its principal place of business was Pittsburgh. Of its seven wholly owned subsidiaries, two were incorporated under the laws of Ohio, two were incorporated under the laws of Pennsylvania, and three were incorporated in Delaware.

As a foreign corporation, Copperweld was not required to be licensed in Ohio merely because of its ownership of shares in two Ohio corporations. The ownership of these shares did not make Copperweld the owner of any operating assets in Ohio; nor did it constitute doing business in the state.<sup>69</sup> Approximately one year after the incorporation of its two Ohio subsidiaries, Copperweld itself surrendered its license to transact business as a foreign corporation in Ohio.

When the tender offer was announced, Copperweld "fought hard to stave off a takeover by Societe Imetal[;] Copperweld executives opposed the bid in court, [and] employees staged placard-waving demonstrations pleading that the company stay American-owned."<sup>70</sup> But the Ohio statute was by far the strongest weapon the target had, and the statute was used to obtain considerable delays.

The Ohio takeover statute applies to tender offers for a company which either was incorporated in Ohio or has its principal place of business in Ohio, and which has substantial assets within Ohio. One might reason, therefore, that the statute would not apply in this case,

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66. 403 F. Supp. 579 (W.D. Pa. 1975). See generally Wysocki, *The Delaying Game*, Wall St. J., Nov. 19, 1975, at 1, col. 6.

67. 405 F. Supp. 960 (S.D.N.Y. 1975). A recent suit challenging a state takeover statute was instituted on August 23, 1976 in the U.S. District Court for the Southern District of Ohio. The plaintiff, Thrall Manufacturing Company, sought "to enjoin Ohio officials from continuing to interfere with its offer to pay \$14 a share for up to 625,000 shares of [an Ohio corporation,] the Youngstown Steel Door Company." N.Y. Times, Aug. 25, 1976, at 51, col. 3. The complaint included allegations that the Ohio statute unconstitutionally burdened interstate commerce and that the regulation of tender offers had been preempted by the federal securities laws. See pt. III *infra*.

68. Copperweld sought an injunction in federal court based on alleged antitrust and securities violations. *Copperweld Corp. v. Imetal*, 403 F. Supp. 579, 585-86 (W.D. Pa. 1975).

69. See, e.g., *Golden Dawn Foods, Inc. v. Cekuta*, 1 Ohio App. 2d 464, —, 205 N.E.2d 121, 123-24 (Ct. App. 1964).

70. *Takeovers Applying "Unfriendly" Persuasion*, Time, Dec. 15, 1975, at 58.



since the target company was not incorporated in Ohio nor did it have either its principal place of business or substantial assets in the state—in short, it met none of the criteria. Nevertheless, the Ohio attorney general sued to enjoin Societe Imetal until it complied with the Ohio statute.<sup>71</sup> In support, Copperweld argued that the tender offer was within Ohio's jurisdiction<sup>72</sup> because substantial assets and operations of its two subsidiaries were tantamount to a principal place of business of the parent.<sup>73</sup>

The merits of this argument were never adjudicated and it remains unclear whether substantial assets within the state provide a sufficient jurisdictional basis under the statute. If substantial assets, standing alone, do constitute a sufficient jurisdictional basis, the question arises whether "substantial assets" includes a subsidiary's assets as well as those of the parent.<sup>74</sup> Societe Imetal eventually consented to jurisdiction and the Division of Securities entered an order stating that the offeror had complied with the statute.

In a similar case, United Technologies Corp. made a tender offer for fifty-five percent of the shares of Otis Elevator Company, a New Jersey corporation. A motion by Otis for a preliminary injunction based on alleged violations of federal law was pending in the United States District Court for the Southern District of New York when Otis invoked the Indiana takeover statute on the ground that a "substantial portion of its total assets" was located there.<sup>75</sup> After (1) a cease and desist order by the Indiana Securities Commissioner, (2) a lawsuit commenced by Otis in state court resulting in a temporary restraining

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71. Suit was commenced in the Court of Common Pleas. *Ohio v. Imetal*, No. 75 Civ. 09-3868 (C.P. Franklin County, Ohio, Oct. 9, 1975). At the time this suit was instituted, a suit based upon federal law was being litigated in the Federal District Court in Pittsburgh. *Copperweld Corp. v. Imetal*, 403 F. Supp. 579 (W.D. Pa. 1975). Although Societe Imetal was successful in the federal case, the tender offer was delayed pending the adjudication of the Ohio suit.

72. There appears to be no precedent for imputing a parent's principal place of business from the activities of its subsidiaries. In *Inland Rubber Corp. v. Triple A Tire Serv., Inc.*, 220 F. Supp. 490 (S.D.N.Y. 1963), the only case cited by the State of Ohio involving a subsidiary, the location of the subsidiary's principal place of business was in issue. The court determined the answer by examining the subsidiary's activities, without considering the activities of the parent.

73. See Pre-hearing Brief of Defendants Copperweld Corp., Copperweld Steel Co. and Ohio Steel Tube Co., *Ohio v. Imetal*, No. 75 Civ. 09-3868 (C.P. Ohio 1975). This argument was apparently based upon a test set forth in *Kelly v. United States Steel Corp.*, 284 F.2d 850, 854 (3d Cir. 1960). However, in *Kelly* the issue was the location of defendant's principal place of business and the court resolved the question by looking to the place where most executive decisions were made. The court did not mention the existence or location of subsidiaries.

74. An order dismissing the action was ultimately entered in the Court of Common Pleas. No. 75 Civ. 09-3868 (Franklin County, Ohio, 1975).

75. *Otis Elevator Co. v. United Technologies Corp.*, 405 F. Supp. 960 (S.D.N.Y. 1975). Under the Indiana statute, "substantial assets" within the state provide a sufficient jurisdictional basis. Ind. Code § 23-2-3-1(j) (Supp. 1976).

order, (3) an action by United in the U.S. District Court in Indianapolis challenging the constitutionality of the Indiana statute, (4) a subsequent ruling by the Indiana Securities Commissioner dissolving the cease and desist order on the ground that the statute did not apply to Otis, (5) an action by Otis in state court to review the Commissioner's ruling, (6) the expiration of the state court's temporary restraining order, (7) United's removal of all state court proceedings to the U.S. District Court in Indianapolis, and (8) the remand of Otis' action to the state court to review the Commissioner's ruling, the applicability and constitutionality of the Indiana statute were still not adjudicated! Eventually, United announced termination of its offer and its intent to make a new offer at a higher price.<sup>76</sup>

Imetal and United Technologies were both eventually successful in their takeover efforts.<sup>77</sup> However, both illustrate one of the practical effects of these statutes, namely, the elimination of secrecy and speed, two major virtues of the tender offer technique of acquiring corporate control.<sup>78</sup> At present, the full effects of state takeover statutes remain unclear. This uncertainty as to their scope and effect has operated as a strong deterrent to potential offerors.<sup>79</sup> When fewer states had statutes, offerors could effectively employ the expedient of limiting offers to states where no more restrictive regulations than the federal scheme were in effect.<sup>80</sup> As more laws are enacted, this tactic becomes useless, and to avoid injunctions and other penalties an offeror, as a practical matter, may be forced to comply with the most restrictive of the state acts.<sup>81</sup>

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76. Trough, *Purchased affection: a primer on cash tender offers*, Harv. Bus. Rev., July-Aug. 1976, at 82-83.

77. After considerable delays and legal activity in both federal and state courts, Societe Imetal's tender offer was successful with more than two-thirds of Copperweld's stock being purchased. Similarly, United Technologies acquired two-thirds of Otis' stock when Otis agreed to go along with the tender offer after United had raised its bid by \$2 per share. *Id.*

78. When a delay is obtained, more options become available to the target. In a recent bid delayed by the Ohio procedure, Microdot, Inc. was able to arrange a friendly merger with a third party at \$21 per share while the tender offer of General Cable at \$17 per share was still in court. N.Y. Times, July 6, 1976, at 42, col. 4. Similarly, a target has more leisure to mount a propaganda campaign of its own against the offeror's motives and abilities. See, e.g., N.Y. Times, July 14, 1976, at 53, col. 1-2; *advt.*, *id.* at 57 (campaign of opposition to exchange offer, which was required to be announced before its effective date).

79. N.Y. Times, July 6, 1976, at 42, col. 4.

80. See, e.g., Wall St. J., March 18, 1976, at 26, col. 2 ("The Offer is not being made to . . . holders of Shares in any jurisdiction of the United States . . . in which the Offer or the acceptance thereof would not be in compliance with the securities laws of such jurisdiction."); Wall St. J., Nov. 21, 1975, at 33, col. 2 (offeror gave its opinion, as part of advertised offering information, that Indiana takeover statute was inapplicable to offer).

81. Some acts, indeed, purport to apply even where an offeror makes this kind of disclaimer.

Case law regarding these statutes is limited, in part because they are new, but also because the few cases filed have not been adjudicated on the merits. Since delay so often spells failure for the offeror, few corporations that find their offers enjoined or otherwise delayed have the resources or the inclination to pursue legal answers that will be of little benefit to them. Thus vital questions concerning the validity of these laws continue to recur but to evade review.<sup>82</sup>

The most serious questions about state takeover statutes are (1) whether these statutes violate the commerce clause of the Constitution and (2) whether the Williams Act has preempted state authority to regulate in this area.

### III. CONSTITUTIONALITY OF STATE TAKEOVER STATUTES

#### A. *The Commerce Clause*

The United States Constitution gives Congress the power "[t]o regulate Commerce . . . among the several States"<sup>83</sup> in order to promote commercial intercourse among the states and to insure the existence of a national economy free from unjustifiable local restraints.<sup>84</sup> In *Pike v. Bruce Church, Inc.*,<sup>85</sup> the Supreme Court stated the criteria for determining the validity of state statutes which affect interstate commerce:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.<sup>86</sup>

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For example, the Ohio act was criticized in testimony before the Senate Committee on Banking, Housing, and Urban Affairs by SEC Commissioner Philip A. Loomis, Jr., this year. The Commissioner said in essence that the statute seemed "designed to prevent an offer from being made outside of Ohio unless and until the Ohio Act has been complied with if there are shareholders in Ohio." CCH Fed. Sec. L. Rep. No. 630, Feb. 25, 1976, at 6. See also, e.g., the Indiana act, which provides that "[a]n offeror may not make a take-over offer involving a target company which is not made to the owners of equity securities of the target company who are residents of this state." Ind. Code § 23-2-3-5(e) (Supp. 1976).

82. See *Copperweld Corp. v. Imetal*, 403 F. Supp. 579, 606-07 (W.D. Pa. 1975) (district court dissolving federal injunction noted pendency of state injunctive suit, but did not discuss conflict with state law).

83. U.S. Const. art. I, § 8.

84. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 760 (1967); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); Stern, *The Commerce Clause and the National Economy, 1933-1946* (pts. 1-2), 59 Harv. L. Rev. 645, 883 (1946); Dowling, *Interstate Commerce and State Power*, 27 U. Va. L. Rev. 1 (1940).

85. 397 U.S. 137 (1970).

86. *Id.* at 142. See Aranow & Einhorn, *State Securities Regulation of Tender Offers*, 46 N.Y.U.L. Rev. 767, 772 & n.33 (1971); *Commerce Clause Limitations*, supra note 55, at 1152-53. See generally Moylan, *State Regulation of Tender Offers*, 58 Marq. L. Rev. 687 (1975).

Under *Pike* three questions must be resolved. First, does the state statute promote a legitimate local public interest? Second, does the statute impose a significant burden upon interstate commerce or is the burden merely incidental? Finally, a balancing test is applied: does the burden imposed clearly outweigh the local benefits presumably being promoted?

### 1. Legitimate Local Interest

Several state interests have been advanced to justify takeover legislation. The most common express legislative purpose has been the protection of persons investing in corporations which are incorporated within or substantially related to the enacting state.<sup>87</sup> Through these statutes, investors are protected from fraud<sup>88</sup> and from their own imprudence in acting hastily in accepting an invitation to tender their securities in the target corporation. This purpose of investor protection also serves as a basis for state blue sky laws.<sup>89</sup> Blue sky laws are intended to protect resident shareholders in their transactions with all corporations. Takeover statutes, however, regulate corporations with certain, sometimes tenuous, local connections in order to protect both resident and nonresident shareholders.<sup>90</sup> Although the takeover statutes have a broader scope than blue sky laws, they are still based on a legitimate local interest, at least insofar as they protect domestic investors. The police power, the basis of state law, justifies the sovereign states' regulation of widely varied activities to protect the health and welfare of state residents.<sup>91</sup> However, it may be argued that state takeover legislation cannot fairly be termed "local" within the scope of the police power, since its benefits necessarily reach beyond the state's boundaries.

In response to this difficulty, it has been suggested that the statutes are grounded in the states' authority to prescribe reasonable uniform regulation of the internal affairs of corporations incorporated under

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87. The Ohio Act has as its stated purpose "to protect [all] shareholders [wherever located] of Ohio and Ohio-based corporations by requiring public announcement and fair, full, and effective disclosures to shareholders in regard to take-over bids." Amend. Sub. S.B. No. 138, File No. 90, at 1 (Reg. Sess. 1969-70), cited in Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case W. Res. L. Rev. 722, 740 (1970) [hereinafter cited as Shipman]; see Vorys, *Ohio Tender Offers Bill*, 43 Ohio Bar 65 (1970).

88. For examples of typical antifraud provisions see Minn. Stat. Ann. § 80B.05 (Cum. Supp. 1976); Va. Code Ann. § 13.1-533 (1973).

89. Loss, *supra* note 5, at 23 ff.

90. Freeman, *Business Associations, 1969-1970*, Annual Survey of Virginia Law, 56 Va. L. Rev. 1536, 1537 (1970).

91. See cases cited in notes 136-38 *infra*; see generally B. Schwartz, *Constitutional Law* § 23 (1972).

their laws, as when a state regulates the conduct of proxy contests of its domestic corporations.<sup>92</sup> But unlike state proxy laws, which govern the relationship between the corporation and its shareholders during an internal struggle for corporate control,<sup>93</sup> state takeover statutes regulate sales transactions to outsiders. The legal existence of any corporation derives from a single state and that state is the source of applicable law defining its attributes, powers and functions. Therefore, internal procedural rules are properly the province of state law. By contrast, a multistate tender offer has nothing to do with internal corporate procedures. Although transfer of control is the goal in both cases, it is accomplished in a tender offer without reference to the legal attributes of the domestic corporation. Hence, regardless of purpose, state regulation of an offer aimed at a domestic target is arguably unjustifiable, at least under the "internal affairs" doctrine.<sup>94</sup>

When a takeover statute is applied to a foreign corporation with some connection to the state, it becomes clearer that the statutory aim to protect shareholders wherever resident cannot be a valid local interest. The aim is altruistic, but its supporting rationale suffers from a conceptual inconsistency. While supporters of the statutes argue that the state of incorporation may control internal corporate affairs, including takeovers through the tender offer method,<sup>95</sup> these same proponents contend that any state which has a significant relationship<sup>96</sup> to a corporation may also regulate the internal affairs, by inference all the internal affairs, of that corporation.<sup>97</sup> Conflicts would certainly result if several states attempted to assert jurisdiction over the internal affairs of one corporation. This demonstrates that the

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92. E.g., Shipman, *supra* note 87, at 744-45. See also Vorys, *Ohio Tender Offers Bill*, 43 Ohio Bar 65 (1970).

93. See, e.g., Del. Code Ann. tit. 8, § 212 (1974). In proxy fights, "[o]nly the right to vote is transferred among existing shareholders." Commerce Clause Limitations, *supra* note 55, at 1154.

94. Commerce Clause Limitations, *supra* note 55, at 1154-55. But cf. Shipman, *supra* note 87, at 744-45, where it is argued that at least in the case of a successful tender offer, the similarities to a proxy solicitation are sufficient to permit state regulation. This argument is strengthened by Congress' finding, in studying the Williams Act, that takeover bids are functionally similar to proxy fights. H.R. Rep. No. 1711, 90th Cong., 2d Sess. 3 (1968).

95. See notes 92-94 *supra* and accompanying text.

96. See notes 24-25 *supra* and accompanying text.

97. See Shipman, *supra* note 87, at 755. State regulation of the internal affairs of a corporation carrying on a substantial part of its operations in a state other than its state of incorporation is justified on the ground that in many cases corporations have only nominal connection with their state of incorporation while operating elsewhere. *Id.* at 752. While this is often true, since the state of incorporation has authorized the creation of a corporation and has ultimate power over its corporate existence, the better view is that, for consistency, that state alone should be responsible for controlling corporate activities which touch upon the internal control of the corporation. See Commerce Clause Limitations, *supra* note 55, at 1155-57.

assertion that takeover statutes are in the best interest of investors<sup>98</sup> is unrealistic.

"Protection of investors," like much of the language in blue sky laws and the takeover statutes, is borrowed from the Securities Exchange Act<sup>99</sup> as an express purpose for the legislation. However, other considerations plainly have entered into the proposal and enactment of takeover laws. In a few cases these considerations are express. But the search for legislative intent does not end with legislative policy declarations. If the statute's practical operation exhibits an unstated purpose underlying its enactment, a court may examine that purpose when evaluating the statute's validity.<sup>100</sup>

It has been observed that "[a] number of states apparently feared that established local concerns might, through the tender offer device, be taken over by outside interests who would then close down plants and leave local residents jobless."<sup>101</sup> Recently, at least two statutes have included this concern over jobs as an express purpose of the legislation.<sup>102</sup> This purpose may also be inferred from the fact that the majority of acts exempt offers approved by management.<sup>103</sup>

In response to this threat, the state legislatures have apparently sought to protect existing management from ouster or the reorganization that might follow a successful, unfriendly tender offer. State legislation which aims to promote employment opportunities for its residents is clearly local in character and seems a legitimate exercise of the general police power. This point must be recognized despite the fact that its main advocates are often present management concerned more about their own jobs than about the state's economic welfare.<sup>104</sup>

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98. See text accompanying notes 87-91 *supra*.

99. See, e.g., 15 U.S.C. § 78e (1970).

100. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 144-45 (1970); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928).

101. Aranow & Einhorn, *State Securities Regulation of Tender Offers*, 46 N.Y.U.L. Rev. 767, 768 (1971); see *Corporate Control*, *supra* note 2, at 172; *Commerce Clause Limitations*, *supra* note 55, at 1157-58.

102. Pa. Pub. L. No. 1106, § 2 (2 CCH Blue Sky L. Rep. ¶ 41,182 (March 3, 1976)). The preamble to the Tennessee Act cites the possible adverse effect of the transfer of corporate assets or suspension of operations after a takeover. Tenn. S. Bill No. 1707 (1976), enacted as Tenn. Code Ann. §§ 48-2101-2115 (3 CCH Blue Sky L. Rep. ¶¶ 45,191-205 (March 17, 1976)).

103. See note 30 *supra* and accompanying text.

104. In at least some states, the takeover statutes are a form of special interest legislation. For example, in early 1969, B.F. Goodrich, an Ohio manufacturer, having successfully repelled a takeover by Northwest Industries, joined with the Ohio Manufacturers Association to draft state legislation which would delay or block takeovers of corporations located in Ohio. *Fortune*, July, 1969, at 110. See also Norris, *The Robber Barons of Today*, *Wall St. J.*, May 11, 1976, at 22, col. 4-6 (recommendation that corporations seek state legislation); *Ruthlessness by the Rules*, *Forbes*, Feb. 1, 1976, at 27-28; Wysocki, *The Delaying Game*, *Wall St. J.*, Nov. 19, 1975, at 26, col. 2 (Idaho statute sponsored by Morrison-Knudsen Co.).

The legislature may fairly be interested in perpetuating the tenure of those managers who favor doing business in the state. That this is a legitimate state interest appears by analogy to several states' favorable corporation laws<sup>105</sup> under which a company may find advantages.<sup>106</sup>

Further reasons for these statutes have been expressed by a few legislatures and probably considered by others. These include the adverse economic effect on business, apart from unemployment, suffered when a large corporation leaves a state, as well as losses, presumably of tax revenues, which would result should the "offeror transfer [the target] company's assets out of [the] state."<sup>107</sup> Such losses would have unfavorable domestic effects and their prevention is certainly desirable in the state's view.

## 2. Extraterritorial Effect

Most takeover statutes apply not only to corporations formed under a state's laws, but also to companies which have their principal place of business or substantial assets, or both, within the jurisdiction.<sup>108</sup> They also affect shareholders domiciled outside the state.<sup>109</sup> Although a state may have only minimal contact with a foreign corporation or shareholder, the terms of some takeover statutes permit the state to

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105. See, e.g., the Delaware and New Jersey corporation laws generally, Del. Code Ann. tit. 8 (1974); N.J. Stat. Ann. tit. 14A (1969).

106. Just as corporations "migrated" to pro-management states in the early 1900's, see Louis K. Liggett Co. v. Lee, 288 U.S. 517, 541, 557-64 (1933) (Brandeis, J., dissenting); W. Cary, Corporations 9-13 (4th unabridged ed. 1969), corporations fearful of imminent tenders have recently been changing their states of incorporation, see Wysocki, The Delaying Game, Wall St. J., Nov. 19, 1975, at 26, col. 1, with the effect of spurring competitive enactment by still more states.

107. Preamble, Tenn. S. Bill No. 1707, enacted Mar. 17, 1976; see, e.g., Utah S. Bill No. 10, § 2 (3 CCH Blue Sky L. Rep. ¶ 47,337 (February 5, 1976)).

108. E.g., Wis. Stat. Ann. § 522.01(6) (Supp. 1975); Ohio Rev. Code Ann. § 1707.041(A)(1) (Page Supp. 1976). This raises the question of how much of a company's assets are "substantial" for determining when the statute will apply. Ultimately this must be a question for the courts, but in the meantime a state securities commission is free to define "substantial assets" and, in the final analysis, to control the progress of pending tender offers. In December, General Cable Corp., a Connecticut company, offered to buy a controlling amount of shares of Microdot, Inc., another Connecticut corporation. Microdot strenuously resisted this attempt. One defensive step it took was to invoke the protection of the Ohio tender offer act. The Ohio Division of Securities ruled that since Microdot had substantial assets in Ohio, General Cable's tender offer was within its jurisdiction. General Cable agreed to proceed with its tender offer in accordance with the Ohio statutory requirements and the findings of hearings on the offer. Meanwhile, Northwest Industries, Inc., hitherto uninvolved in this matter, announced its plans to make a tender offer for 51% of Microdot's common shares, offering four dollars more per share than General Cable. Wall St. J., Jan. 27, 1975, at 2, col. 2.

109. See, e.g., Sommer, The Ohio Takeover Act: What Is It?, 21 Case W. Res. L. Rev. 681 (1970).

undertake substantial regulation of their affairs.<sup>110</sup> This extensive extraterritorial control distinguishes state takeover statutes from state blue sky laws. The latter govern the sale of securities exclusively within one state, requiring sellers to disclose information designed to provide the investing public with a basis upon which to make an informed investment decision.<sup>111</sup>

Early challenges to blue sky laws upheld intrastate regulation of securities on the basis that a state has the power to protect its residents from fraudulent stock offers.<sup>112</sup> However, as the scope of "interstate commerce" has widened,<sup>113</sup> it has become increasingly difficult to claim that any activity, particularly a securities transaction, is wholly intrastate and hence within the exclusive province of the states. Consequently, it has been urged that blue sky laws should be abolished or made uniform<sup>114</sup> since they have many interstate effects, and claims to jurisdiction under them have come to depend somewhat artificially upon the place where a sale is said to occur.<sup>115</sup> Whatever the arguments for restricting blue sky laws, they apply with even greater force to state takeover statutes, which present far greater impediments to interstate commerce. Not only may they affect a remote shareholder's ability to sell his shares, or the affairs of a corporation with minimal local contacts; but the action taken by one state in respect to a tender

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110. See summary of testimony of SEC Commissioner Loomis, note 81 *supra*. Societe Imetal's attempt to take over Copperweld exemplifies remote extraterritorial control. Although two of Copperweld's subsidiaries were incorporated in Ohio, Copperweld itself was not even licensed to do business there. See *Copperweld Corp. v. Imetal*, 403 F. Supp. 579 (W.D. Pa. 1975). Ironically, Pennsylvania, which was the target's principal place of business and state of incorporation, had, prior to this case, considered legislation similar to the Ohio takeover act, but decided against adoption. Pennsylvania has since enacted such a statute. Pa. Pub. L. No. 1106 (2 CCH Blue Sky L. Rep. ¶¶ 41,181-196 (March 3, 1976)).

111. For an exhaustive study of state blue sky laws see Loss, *supra* note 5, at 23-107.

112. *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 644 (1950); *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 552 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559, 564 (1917); *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568, 586 (1917). See generally Loss, *supra* note 5, at 33-43.

113. See *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974). In this case, cotton to be delivered to a warehouse located in the same state as the farm upon which it was grown was held within interstate commerce because delivery to the warehouse where cotton was sorted and classified was essential for completion of what would eventually be an interstate transaction. *Id.* at 30.

114. Arguments for abolition are discussed in Loss, *supra* note 5, at 102-03; the Uniform Securities Act is examined *id.* at 90-105. After an extensive study of blue sky laws, two securities experts concluded that all such legislation should be discarded, since even the most simplistic securities transactions within a state utilize interstate facilities. L. Loss & E. Cowett, *Blue Sky Law* (1958).

115. See, e.g., *Kreis v. Mates Inv. Fund, Inc.*, 473 F.2d 1308 (8th Cir. 1973).



offer may also disrupt trading and the orderly regulation of the national securities market.<sup>116</sup>

In addition, takeover legislation burdens remote offerors, who cannot proceed with the offer until they have complied with the pre-filing, disclosure, and hearing requirements of each state whose statute purports to control bids for the target. The conflicts among the state statutes to which the offeror is subject<sup>117</sup> demonstrate their extraterritorial effect. Similarly, in the *Copperweld* case,<sup>118</sup> concurrent regulation of a tender offer resulted in a stand-off between a state and a federal court. Copperweld's injunction request was denied by a federal judge, but was granted by a state judge with the result that the tender offer effective in all states was suspended until the state takeover requirements were met.<sup>119</sup> The commerce clause was aimed at preventing such unilateral action by a state.<sup>120</sup>

### 3. Excessive Burden on Interstate Commerce

The final *Pike* criterion is whether the burden the state legislation places on interstate commerce is clearly excessive compared to the putative local benefits.<sup>121</sup> The Court in *Pike* noted that such an effect

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116. See New York Stock Exchange review of Ohio Rev. Code Ann. § 1707.041 (Page Supp. 1975), in B.N.A. Sec. Reg. & L. Rep. No. 1, at A-12 (June 4, 1969); notes 56-59 *supra* and accompanying text.

117. Delaware requires that an offer be made not less than 20 nor more than 60 days after delivery of a statement of intent to make an offer. Del. Code Ann. tit. 8, § 203(a)(1) (1 CCH Blue Sky L. Rep. ¶ 11,131 (May 1, 1976)). If an offer is made for shares of a Delaware corporation with substantial assets in Ohio, the hearings which might be required by Ohio, see text accompanying notes 48-50 *supra*, could delay the offer's effective date beyond the period in which the offer would comply with Delaware law.

Another uncertain situation has arisen concerning the shareholders' right to withdraw tendered shares. All the statutes except Ohio's have some provision on this point. Although some statutes conform to the provision in the Williams Act, 15 U.S.C. § 78n(d)(5) (1970), for withdrawal during the first seven days or after 60 days, e.g., Minn. Stat. Ann. § 80B.06(2) (Cum. Supp. 1976), others provide inconsistent rights. E.g., Ind. Code § 23-2-3-5 (Supp. 1976) permits withdrawal of the shares any time up to a few days before the expiration of the offer.

118. *Copperweld Corp. v. Imetal*, 403 F. Supp. 579 (W.D. Pa. 1975); see text accompanying notes 68-74 *supra*.

119. See notes 68-74 *supra* and accompanying text.

120. See *Toomer v. Witsell*, 334 U.S. 385 (1948); *Johnson v. Haydel*, 278 U.S. 16 (1928). In *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), the Court invalidated state regulation or prohibition of exportation of shellfish taken from coastal waters. The real purpose behind the state statute was to protect the local canning and manufacturing industries. However, since the shellfish was not kept for the exclusive use of state residents but shipped out of state, the Court determined this economic favoritism unconstitutionally burdened interstate commerce. See also *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

121. 397 U.S. at 142. This balancing test is generally traceable to *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945), in which the direct regulation of train lengths was

had been "declared to be virtually *per se* illegal"<sup>122</sup> in prior cases. In *Pike*, Arizona required cantaloupes produced in Arizona to be packed within the state for the declared purpose of enhancing the reputation of the Arizona cantaloupe industry. This requirement caused severe hardship to at least one producer, who would have had to build a packing plant in Arizona rather than merely ship to a plant a few miles away in California. Construing Arizona's law to be analogous to an unconstitutional attempt to promote local employment at the expense of interstate commerce, the Supreme Court struck down the statute as an undue burden on commerce even though a legitimate state purpose was being furthered.<sup>123</sup>

Since the takeover statutes operate to shield state residents and incumbent management by imposing regulations which so delay the tender offer as to threaten the offer's success, the statutes place a burden on commerce so excessive as to suggest their invalidity.<sup>124</sup> It must be noted in addition that in the case of statutes which do not exempt "friendly" offers<sup>125</sup> from their scope, the method chosen to protect state interests puts a different burden on interstate commerce. Unlike laws that use positive provisions, such as tax and other incentives, to attract and keep business in the state, such takeover laws suggest that there exists state power to prevent the voluntary emigration of domestic corporations. Such an assertion cannot survive commerce clause scrutiny. Even if the states are pursuing legitimate local interests, the extraterritorial control exerted by such statutes

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held to be an unconstitutional burden on the flow of commerce since the prospect that each state might mandate different maximum lengths was potentially hazardous to interstate commerce. In *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), actual conflicts among the states did arise with respect to the shape of mudguards on trucks using state highways. Delays caused by the necessity of changing mudguards at state lines were held an unconstitutional burden on commerce. See Note, State Environmental Protection Legislation and the Commerce Clause, 87 Harv. L. Rev. 1762, 1778 (1974).

122. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

123. *Id.* at 145-46.

124. The commerce clause has been held to prohibit a state from imposing standards on carriers, for example, if the rules would substantially delay the flow of goods through the stream of interstate commerce. See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (specialized truck mudguards required while driving through state); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (state regulation of train length). Arguably, however, state takeover statutes regulate activities before the operation of commerce begins (i.e., before the tender offer is effective) and consequently, state regulation is permissible. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). As a practical matter, this is not necessarily true. In the *Copperweld* case, for example, the offers were outstanding when the Ohio statute was invoked. See notes 67-68 *supra* and accompanying text.

125. These presently include Colorado, Connecticut, Delaware, Hawaii, Kansas, Kentucky, Maryland, Nevada, Pennsylvania, and Utah.

demonstrates the need for uniform regulation of tender offers in order to insure the smooth flow of interstate commerce.<sup>126</sup>

Absent a tender offer fight, the burden an individual statute places on the progress of a tender offer may itself be minimal. However, if several state statutes apply concurrently or consecutively to an offer, the conflicts existing among state provisions<sup>127</sup> and with the federal system may reduce the usefulness of tender offers and disrupt the regularity of trading on the national markets. The resulting interference with interstate commerce indicates that these statutes conflict with the commerce clause and are therefore unconstitutional.

### B. *The Preemption Doctrine*

The supremacy clause<sup>128</sup> of the Constitution and the preemption doctrine have been used interchangeably as a means of finding overreaching state laws unconstitutional.<sup>129</sup> Under the supremacy clause, a state law is invalid when it conflicts directly with federal law, thus rendering compliance with both impossible.<sup>130</sup> Under the preemption doctrine, however, direct conflict is unnecessary;<sup>131</sup> a state law exhibiting a purpose which is valid, and perhaps even consistent with federal legislation, may nevertheless be invalid where its effect is to pose an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>132</sup>

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126. See Commerce Clause Limitations, *supra* note 55, at 1173.

127. These conflicts are separately discussed in notes 117 *supra*, 172-79 *infra* and accompanying text.

128. The supremacy clause of the Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2.

129. See, e.g., *Perez v. Campbell*, 402 U.S. 637 (1971); *California v. Zook*, 336 U.S. 725 (1949); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). Lack of judicial distinction between the supremacy clause and preemption may account for the confusion which surrounds them. The scope of these two constitutional doctrines has been discussed in Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DePaul L. Rev. 630 (1972); Comment, *A Conceptual Refinement of the Doctrine of Federal Preemption*, 22 J. Pub. L. 391 (1973).

130. See, e.g., Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DePaul L. Rev. 630, 636 n.34 (1972); Comment, *A Conceptual Refinement of the Doctrine of Federal Preemption*, 22 J. Pub. L. 391, 396 (1973).

131. See Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DePaul L. Rev. 630, 636 n.34 (1972); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum. L. Rev. 623, 636 (1975) [hereinafter cited as *Preemption Doctrine*]. See generally Hirsch, *Toward a New View of Federal Preemption*, 1972 U. Ill. L.F. 515; Note, *Federal Pre-emption of State Laws: The Effect of Regulatory Agency Attitudes on Judicial Decisionmaking*, 50 Ind. L.J. 848 (1975).

132. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

These two constitutional principles should be distinguished.<sup>133</sup> The preemption doctrine is broader in scope, as it not only invalidates the specific law at issue but also negates the states' power to regulate in the field. The Supreme Court has always approached questions of preemption on a case-by-case basis, so that a single formula for predicting whether a state law will be preempted cannot be established.<sup>134</sup> The trend in the Court, however, has been away from preempting the states in the absence of a clear congressional mandate to that effect.<sup>135</sup> Such a mandate might be found in the express provisions of a statute,<sup>136</sup> although it is more likely that an exclusionary intent on the part of Congress would be found in the legislative history of an act. It is possible that the intent to exclude could be inferred from a detailed, comprehensive legislative scheme<sup>137</sup> or from the need to promote a uniform national policy. This latter need can be expressed or inferred from the subject matter of the regulation.<sup>138</sup> It is important, however,

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133. See, e.g., Comment, A Conceptual Refinement of the Doctrine of Federal Preemption, 21 J. Pub. L. 391, 394-97 (1973).

134. See generally Preemption Doctrine, *supra* note 131.

135. The guidelines established by the Court can be roughly classified into three periods: (1) During the 1930s, the Court required a showing that Congress expressly intended to occupy a field. E.g., *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940); *H.P. Welch Co. v. New Hampshire*, 306 U.S. 79, 85 (1939); *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 10 (1937); *Mintz v. Baldwin*, 289 U.S. 346, 350 (1933). During this period state interests were supported, excluding federal objectives in the process. A presumption of validity of state laws exercising the police power was created.

(2) Starting in the 1940s, the Court began to infer a congressional intent from the pervasiveness of federal legislation. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 73-74 (1941); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Pennsylvania v. Nelson*, 350 U.S. 497, 502 (1956); *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973); see Preemption Doctrine, *supra* note 131, at 636-39. See generally Note, "Occupation of the Field" in Commerce Clause Cases, 1936-1946: Ten Years of Federalism, 60 Harv. L. Rev. 262 (1946). In this "Federal period," federal interests were regarded as paramount.

(3) Most recently, the Court appears to be shifting back to requiring a direct showing of congressional intent, which may be evidenced by the statutory language or legislative purpose. See, e.g., *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *Goldstein v. California*, 412 U.S. 546 (1973); *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405 (1973); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-52 (1963). For a complete discussion of this movement see Preemption Doctrine, *supra* note 131, at 639-54.

136. See, e.g., *Goldstein v. California*, 412 U.S. 546 (1973). See also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Baltimore Nat'l Bank v. State Tax Comm'n*, 297 U.S. 209 (1936). This express language may take the form of a "preemption clause."

137. *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (lack of express preemption provision not decisive); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

138. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 167 (1942) (renovated butter industry cannot be effectively regulated by isolated competing states because of its multi-state activity).

to recognize that the Court will no longer preempt a state law merely because Congress may have regulated "in the field."<sup>139</sup>

State blue sky laws and federal regulation of securities have coexisted for many years, the Supreme Court having long ago, prior to the securities acts, held that such state legislation was constitutional.<sup>140</sup> This is so, however, only in the absence of conflict. As section 28 of the Securities Exchange Act provides:

Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person *insofar as it does not conflict* with the provisions of this chapter or the rules and regulations thereunder.<sup>141</sup>

Even if this is not express preemption, the state tender offer statutes seem to be preempted under two other standards<sup>142</sup>—the existence of a dominant federal interest or national policy, and the presence of federal regulation so pervasive one can infer the intent to exclude state regulation.<sup>143</sup> Finally, apart from these judicial tests, state provisions in actual conflict with federal law must be preempted *pro tanto*.

#### 1. Federal Exclusion of State Control: National Policy and Dominant Federal Interest

Congress has not expressly forbidden the states to regulate tender offers.<sup>144</sup> However, pre-effective filing, hearing and extensive disclo-

139. Cf. *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

140. *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917) (Ohio); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917) (S.D.); *Merrick v. Halsey & Co.*, 242 U.S. 568 (1917) (Mich. blue sky law).

141. 15 U.S.C. § 78bb(a) (1970) (emphasis added).

142. SEC Commissioner Loomis testified before a Senate committee recently to his belief the Williams Act preempts state power in the field of tender offers. CCH Fed. Sec. L. Rep. No. 630, Feb. 25, 1976, at 6.

143. These two tests are used when Congress legislates in a field traditionally occupied by the states. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); cf. *Goldstein v. California*, 412 U.S. 546, 561 (1973). See also Comment, A Conceptual Refinement of the Doctrine of Federal Preemption, 22 J. Pub. L. 391, 392 (1973); Note, Pre-emption as a Preferential Ground: A New Canon of Construction, 12 Stan. L. Rev. 208 (1959). Once it is determined that Congress intended to achieve one uniform system of regulation, the test becomes "whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State." *Rice v. Santa Fe Elevator Corp.*, *supra*, at 236.

144. Of course, when Congress was considering the Williams Act no state takeover statutes had been enacted or even proposed. Aranow & Einhorn, State Securities Regulation of Tender Offers, 46 N.Y.U.L. Rev. 767 (1971); Sommer, The Ohio Takeover Act: What Is It?, 21 Case W. Res. L. Rev. 681 (1970).

sure requirements of state takeover statutes, viewed in light of the history of the Williams Act, plainly interfere with Congress' overall design for securities regulation, since Congress explicitly rejected such provisions.

When a tender offer was made prior to the Williams Act, a security holder could sell all of his holdings, or he could sell only a portion of them and remain a shareholder in the old company "under a new management which he . . . helped to install without knowing whether it [would] be good or bad for the company."<sup>145</sup> The Williams Act sought to provide the shareholder with knowledge of the identity of the offeror and of its plans and intentions regarding the target company's future. The minimal disclosure requirements of the Act provide shareholders with the information necessary to make an informed decision regarding the sale of their equity interests in the target. In providing for this disclosure, Congress drafted the bill without prejudice against the tender offer as a method of achieving the transfer of corporate ownership. The House and Senate committees reported that "[t]he bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case."<sup>146</sup>

The Williams Act was originally drafted to require the offeror to file with the SEC a confidential disclosure statement at least five days before the commencement of the offer.<sup>147</sup> The SEC favored pre-effective filing, patterned on the procedure in proxy contests, "since it would give the Commission an opportunity to review the statement and point out any inaccuracies or inadequacies before any soliciting material was published or sent to stockholders."<sup>148</sup> However, during Senate hearings, critics voiced their disapproval of any pre-effective filing and scrutiny by the SEC. Representatives of the major stock

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145. H.R. Rep. No. 1711, 90th Cong., 1st Sess. 2 (1968); S. Rep. No. 550, 90th Cong., 1st Sess. (1967).

146. H.R. Rep. No. 1711, 90th Cong., 1st Sess. (1968); S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967). Manuel F. Cohen, then Chairman of the SEC, testified before the Senate that the Williams Act "is designed solely . . . to fill the gap in the provisions of the Securities Exchange Act of 1934 to cover planned acquisitions of large blocks of securities of publicly held companies, where control of the company may be at stake. It is not intended to encourage or to discourage such activity or to provide management or any other group with special privileges over any other." Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 16 (1967) [hereinafter cited as Senate Hearings]. See also Wall St. J., March 22, 1967, at 2, col. 4.

147. S. 510, 90th Cong., 1st Sess. (1967)

148. Testimony of Manuel F. Cohen, Senate Hearings, *supra* note 146, at 20.

exchanges were concerned that leaks which might occur before the tender offer was made would force its abandonment. Other concerns were expressed as well.<sup>149</sup> New York Stock Exchange Vice-President Donald L. Calvin testified that:

The prefilng proposal might also provide an opportunity for market manipulations. An information statement might be filed solely to provide the basis for rumors of an impending offer for a company [by someone] without any intention of making the offer. The price manipulation could then take place, and it would be difficult, if not impossible, to prove that such manipulation was intended.<sup>150</sup>

Mr. Calvin also pointed out that

if word of the impending offer becomes public, the price of the stock will rise toward the expected tender price. Thus, the primary inducement to stockholders, an offer to purchase their shares at an attractive price above the market, is lost, and the offeror may be forced to abandon its plan or to raise the offer to a still higher price. The cost of an offer to purchase hundreds of thousands of shares might prove prohibitive if the price had to be increased only a few dollars per share.<sup>151</sup>

Opposition to the five-day period during which the SEC would review an offeror's information statement continued throughout the hearings. The bill was amended to delete the five-day waiting period and was finally passed by the Senate with the present language, as suggested by the New York Stock Exchange.<sup>152</sup>

The following year a similar bill was the subject of House hearings.<sup>153</sup> As introduced, it required an offeror to file an information statement with the SEC five days before commencement of the offer.<sup>154</sup> The chairman of the SEC, though recognizing that the New York Stock Exchange recommendations to the contrary had been persuasive to the drafters of the Senate bill,<sup>155</sup> again testified in favor of this requirement.<sup>156</sup> Again, the critics spoke out against it for the

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149. Testimony of Donald L. Calvin, Vice President, New York Stock Exchange, *id.* at 69-79; Testimony of Ralph S. Saul, President, American Stock Exchange, *id.* at 96-98; Testimony of Robert W. Haack, President, National Ass'n of Securities Dealers, *id.* at 106-108.

150. Testimony of Donald L. Calvin, *id.* at 75.

151. *Id.* at 72. See Moylan, *State Regulation of Tender Offers*, 58 Marq. L. Rev. 687, 688-89 (1975).

152. S. 510, 90th Cong., 1st Sess. (1967).

153. H.R. 14475, 90th Cong., 1st Sess. (1967).

154. *Id.*

155. Testimony of Manuel F. Cohen, Hearings on H.R. 14475, S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 1st Sess. 17 (1968). Mr. Calvin put his suggestion simply when he stated: "We urge . . . that market disruptions must be avoided and that this can best be accomplished by requiring the statement to be filed when the offer is commenced." *Id.* at 76.

156. *Id.* at 10.

same reasons given before the Senate subcommittee.<sup>157</sup> The bill was amended and passed without the five-day provision.<sup>158</sup> Most recently, a bill was introduced in the first session of the Ninety-Fourth Congress requiring filing sixty days before commencement of tender offers.<sup>159</sup> This bill has not been reported out of committee.<sup>160</sup>

The legislative history of the Williams Act and of the attempts to amend it clearly shows that when Congress was faced with the choice of requiring an information statement to be filed some time before the effective date of an offer in order to give the SEC time to examine the adequacy of disclosure, or of requiring the statement to be filed when the offer is commenced, it preferred the latter. Thus, Congress purposefully chose not to require any pre-effective disclosure.<sup>161</sup> This repeated rejection, coupled with the explicit reason given therefor, namely fairness to both sides in tender offers, amounts to a clear national policy in the field.

The views of Congress on the advisability of further predisclosure and review became clearer when analogous legislation seeking predisclosure in proposed mergers was also offered in the Ninety-Fourth Congress.<sup>162</sup> Although these proposed amendments to the antitrust laws were primarily concerned with large acquisitions, not particularly tender offers, the policy arguments were analogous. In support of pre-merger notification the argument was made that after-the-fact remedies are inadequate, principally because once the merger is complete, the status quo is difficult to restore.<sup>163</sup> On the other hand, such automatic prior restraint could be viewed as an unjustified burden on business because it would delay business transactions without adequate reason for belief that violations of the law might occur.<sup>164</sup> Faced with choosing between these two policy arguments, both houses passed the amendments in diluted form.<sup>165</sup> However, the

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157. See, e.g., testimony of Donald L. Calvin, *id.* at 43-46.

158. 113 Cong. Rec. 24662 (1967).

159. S. 2522, 94th Cong., 1st Sess. § 3 (1975).

160. See 2 CCH Congressional Index ¶ 2116 (1976).

161. See notes 148-60 *supra* and accompanying text.

162. S. 1284, 94th Cong., 1st Sess. (1975); H.R. 14580, 94th Cong., 2d Sess. (1976). In the past, such proposals have never gone further than passage by one house of Congress. S. Rep. No. 803 (pt. 1), 94th Cong., 2d Sess. 65 n.28 (1976) (noting passage by the House and by various committees on six prior occasions).

163. S. Rep. No. 803 (pt. 1), 94th Cong., 2d Sess. 64-66 (1976) (noting support of Asst. Attorney General Thomas E. Kauper); Hearings on S. 39 Before the Antitrust and Monopoly Subcomm. of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 94-95 (1976).

164. S. Rep. No. 803 (pt. 1), 94th Cong., 2d Sess. 65 (1976).

165. See N.Y. Times, June 11, 1976, at D-1, col. 1, D-5, col. 3; Wall St. J., Aug. 2, 1976, at 2, col. 2.



major policy argument applicable to tender offers was inapplicable here: the acquiring corporation is not vitally dependent upon maintaining secrecy prior to a public announcement as is the case with tender offers, particularly "unfriendly" ones. Hence Congress' approval of these measures does not detract from the conclusion that a national policy exists, shown by Congress' acts in the area, in favor of avoiding arbitrary impediments to corporate acquisitions. This policy should be given full effect in tender offer regulation, where it can be vital to the success of an acquisition.

While the history of the Williams Act clearly indicates an express rejection of pre-effective filing,<sup>166</sup> it does not reveal explicit rejection of two other requirements found in some state statutes, namely (1) hearings held prior to the tender offer taking effect or (2) disclosure of information in the detail of an S-1 registration statement.<sup>167</sup> These possibilities were not proposed in Congress, so the absence of committee reports rejecting them cannot resolve the question whether the state enactments are preempted. But their purpose and effect are so similar to the pre-effective filing requirement that Congress' rationale concerning "tipping the balance"<sup>168</sup> seems equally applicable. It can be argued that the more elaborate disclosure contemplated in statements of the S-1 variety does not conflict substantially with the federal scheme.<sup>169</sup> However, this is true only where advance filing is not required.

## 2. Pervasive Federal Regulation

A second judicial basis for finding federal preemption is where federal regulation in an area is so pervasive that intent to preempt can be inferred therefrom.<sup>170</sup> It may be argued that, on its face, the Williams Act is not a "pervasive" scheme to regulate tender offers since it merely mandates the timing and content of disclosure. However, the sections were integrated by Congress into the Securities Exchange Act of 1934, which in effect controls every other facet of tender offers. Taken as a whole, that Act is certainly comprehensive. Moreover, the

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166. See notes 145-61 *supra* and accompanying text.

167. See notes 42-43 *supra*.

168. See text accompanying note 146 *supra*.

169. Indeed, the target company could no longer delay the offer by charging that the disclosure requirements were not met unless it utilized the traditional method of seeking a preliminary injunction, see Note, Tender Offer Regulation—Injunction Standards Under the Williams Act, 45 Fordham L. Rev. 51 (1976). Microdot, Inc., was successful in delaying General Cable's tender offer by petitioning the Ohio Division of Securities to examine General Cable's filing forms for "full and fair disclosure." See note 108 *supra*. Moreover, the SEC recently moved to impose stricter disclosure requirements under the Williams Act. N.Y. Times, July 15, 1976, at 51, col. 6.

170. See note 143 *supra* and accompanying text.

regulation of the timing of disclosure in tender offers is no mere procedural detail. Concurrent disclosure was found by Congress to be the only fair way to regulate tender offers, since advance disclosure gives such an advantage to the target company and severely limits the usefulness of the tender offer technique.<sup>171</sup> It may thus be said that the timing of disclosure has a substantive effect on tender offers, and hence that Congress' delineation of one method was intended not as a minimum standard but as the standard to be applicable in every state.

### 3. Direct Conflict with the Williams Act

In addition to frustrating the overall plan and intent of Congress, some provisions of state takeover statutes are in direct conflict with federal securities law,<sup>172</sup> regarding the duties of both the tenderer and the offeror.

For example, section 14(d)(5) of the Securities Exchange Act of 1934<sup>173</sup> permits securities deposited pursuant to a tender offer to be withdrawn during the first seven days of the offer or after sixty days if the securities have been neither purchased nor returned. Several states have enacted takeover statutes which directly conflict with these provisions. For example, the Colorado statute permits the offeree to withdraw deposited securities "within fifteen days after the date of the first invitation to deposit securities and at any time after thirty-five days after the date of the first invitation to deposit securities."<sup>174</sup> Indiana extends the time within which securities may be withdrawn "to the third day prior to the announced termination date [of the offer]."<sup>175</sup> Such provisions may place the offeree (state resident or otherwise) in a position in which he is acting rightfully pursuant to a state law while he is in violation of federal law.

Conflicts have also been created in which the offeror while abiding by the federal law will violate the state law. The Nevada act provides that:

Where a takeover bid is made for less than all the shares of a class and where a greater number of shares is deposited pursuant thereto than the offeror is bound or willing to take up and pay for, the shares taken up by the offeror shall be taken up as nearly as

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171. See text accompanying notes 146-52 *supra*.

172. See *N.Y. Times*, July 6, 1976, at 41, col. 7; 42, col. 4.

173. 15 U.S.C. § 78n(d)(5) (1970).

174. *Colo. Rev. Stat. Ann.* § 11.51.5-103(1)(c) (1 CCH Blue Sky L. Rep. ¶ 9153 (July 1, 1975)).

175. *Ind. Code* § 23-2-3-5(a) (Supp. 1976). Of the states which have enacted takeover legislation, at least six (Colorado, Indiana, Hawaii, Kansas, Virginia, and Nevada) provide extensions or potential extensions (depending upon when an offer is scheduled to terminate) beyond those provided by the Williams Act.

may be pro rata, disregarding fractions, according to the number of shares deposited.<sup>176</sup>

Offerors subject to the jurisdiction of the Nevada takeover statute must prorate tenders for the *life* of the offer,<sup>177</sup> whereas the Williams Act requires that only those securities which are tendered within the first ten days of the offer must be purchased on a pro rata basis.<sup>178</sup> Those tendered after that time may be accepted on a first-come, first-served basis.<sup>179</sup> But a shareholder who tenders after the first ten days, and whose shares are not taken up, can assert a right under state law to have his shares prorated, and an offeror could thus be required to purchase substantially more shares than it wanted.

While the differences between the federal and state statutes may seem trivial, the practical effect of these variations in the context of a tender offer is to pose such burdens and uncertainties as to threaten the viability of any offer. Under the supremacy clause the individual substantive provisions of state takeover statutes which directly clash with the Williams Act must give way to a national and uniform system of regulating tender offers.<sup>180</sup>

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176. Nev. Rev. Stat. § 78.3772(3) (1973).

177. Other states which have similar provisions are Colorado, Indiana and Virginia. Hawaii has avoided this problem by mandating that a tender offer as defined by statute may not be made for less than all the outstanding equity securities of a class. Hawaii Rev. Stat. § 417E-2 (Supp. 1975).

178. 15 U.S.C. § 78n(d)(6) (1970).

179. The Williams Act as first proposed required proration of all securities tendered when an offer is made for less than all outstanding equity shares of a class and more than that number are tendered. S. 510, 90th Cong., 1st Sess. (1967). Dissatisfaction with this provision was voiced during the Senate and House hearings: "This provision offers the advantage of avoiding undue haste in making a decision to accept a tender proposal. It also offers the advantage of treating all selling stockholders on an equal basis, and affords an opportunity for news of the tender offer to circulate without prejudice to holders who do not immediately learn of it.

"On the other hand, it tends to put a premium on delay and may not be fair to the selling stockholder who makes up his mind with reasonable promptness.

"Further, it may conflict with the decision of the stockholder who wishes to sell his holdings on an all-or-none basis.

"Balancing the various considerations, we would suggest that thought be given to requiring pro rata treatment for a reasonable period while permitting acceptance on a first-come, first-served basis, during the balance of the tender period or any extension, if the terms of the tender offer so provided." Testimony of Ralph S. Saul, Hearings on H. 14475, S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 1st Sess. 99-100 (1968). If the state pro rata provisions which substantially differ from the federal provisions survive a constitutional attack based on the actual conflict presented, they must fail on the ground that they frustrate a clear congressional design. See notes 145-65 *supra* and accompanying text.

180. See text accompanying note 130 *supra*.

## IV. CONCLUSION

As the economic and corporate development of this country has progressed, transactions involving securities have become more sophisticated and the tender offer has become a viable means by which corporate control can be changed. There can be no doubt that it is necessary to regulate securities transactions. The federal government has imposed such regulation through comprehensive enactments, including the Securities Act of 1933, the Securities Exchange Act of 1934, and the Williams Act.

The states' adoption of further regulation in the tender offer field has made it increasingly difficult for an acquiring company to rely on the tender offer as a device for effecting a smooth transfer of corporate control. The pre-effective disclosure and hearing requirements pursuant to these state statutes frustrate the Congressional design of the Williams Act. In addition, some takeover act provisions directly conflict with the provisions of the Williams Act. Even if the state statutes protect legitimate public interests, their operation unconstitutionally burdens the flow of interstate commerce in a field which requires uniform regulation. The authors suggest that the time has come, in light of the need for uniformity in this field, for Congress to preempt expressly the asserted power of the states to impose inconsistent regulatory schemes in the field of tender offers.

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*[As this Article went to press, H.R. 8532, known as the Hart-Scott-Rodino Antitrust Improvements Bill of 1976, had been amended and passed by both houses of Congress. As amended, the final bill required 30 days notice in advance of significant mergers and 15 days advance filing in cash tender offers.]*